

MAY 20 7 011

1 Permit in conjunction with a preliminary plat for a three-lot subdivision (the
2 "Subdivision"). DDES has improperly conducted "phased review" of the shoreline
3 development associated with the Subdivision by expressly deferring environmental
4 analysis of bulkhead removal, demolition of a boathouse, and construction of a single-
5 family residence on the shoreline lot. See WAC 197-11-060(5). DDES also erred by
6 concluding that environmental review would be conducted under the King County
7 Sensitive Areas Ordinance and by further providing inaccurate public notice of the
8 applicable regulations used in environmental review of the proposed development. DDES
9 erred in its conclusion about historic formation of a steep slope located in the shoreline
10 jurisdiction, and the applicability of buffers in the steep slope hazard area. Finally, DDES
11 failed to adequately evaluate probable significant adverse impacts in the shoreline
12 jurisdiction.

13 The DNS is inadequate under Chapter 43.21C RCW ("SEPA") and Chapter 197-
14 11 WAC and should be remanded to DDES for a determination of significant adverse
15 impacts, based on the complete development proposal, and for appropriate mitigation.

16 **A. Improper Phased Review**

17 DDES erred by conducting phased environmental review of the proposed shoreline
18 development. The subject DNS does not identify environmental review of the Shoreline
19 Permit as being conducted under phased review as required under WAC 197-11-
20 060(5)(e). However, it is evident in the Shoreline Permit Report and Decision that DDES
21 deferred environmental review of certain aspects of the proposal, including bulkhead
22 removal and construction of a single-family residence, until such time as the Applicant
23 applies for a building permit. Att. C. at Comment to Finding ¶8; Condition ¶17.

24
25
STATEMENT OF APPEAL - 2

GordonDerr

2025 First Avenue, Suite 500
Seattle, WA 98121-3140
(206) 382-9540

1 SEPA requires proposals that are related closely enough to each other to constitute
2 a single course of action to be evaluated in the same environmental document. WAC 197-
3 11-060(5)(b). Proposals or parts of proposals are closely related, if they:

4 (i) Cannot or will not proceed unless the other proposals (or parts of
5 proposals) are implemented simultaneously with them; or

6 (ii) Are interdependent parts of a larger proposal and depend on the
larger proposal as their justification or for their implementation.

7 *Id.*

8 Phased review under SEPA is inappropriate when "[i]t would merely divide a
9 larger system into exempted fragments or avoid discussion of cumulative impacts." WAC
10 197-11-060(5)(d)(ii).

11 DDES described the proposal for the subject DNS to include: (1) access to the
12 shoreline parcel by way of a joint use driveway; (2) storm drainage outfall from the two
13 upland lots in the Subdivision; (3) demolition of an existing boathouse; (4) repair-
14 realignment of a bulkhead; (5) a single-family residence; (6) an associated driveway; and
15 (7) utility connections, including water and sewer. There is no question that the
16 Applicant's proposed development as listed in (1)-(7) above are interdependent parts of a
17 larger proposal, namely development of the Subdivision. Additionally, final approval of
18 the Subdivision and construction of the associated residences depend on approval of the
19 Shoreline Permit.¹ However, the project site plan received by DDES on April 19, 2010,
20 and the environmental checklist provided by the Applicant include little information
21 regarding parts (3)-(7) of the proposal described above.

22 Because DDES relies on the Applicant's environmental checklist and bare-bones
23 project site plan in issuing the DNS, DDES failed to evaluate potential significant adverse

24 ¹ Condition 10 of the Subdivision requires a shoreline permit to be issued prior to final review of the
25 Subdivision.

STATEMENT OF APPEAL - 3

GordonDerr.

2025 First Avenue, Suite 500
Seattle, WA 98121-3140
(206) 382-9540

1 impacts from the full scope of shoreline development associated with the Shoreline
2 Permit. Furthermore, DDES improperly segmented the proposal into potentially exempt
3 fragments by deferring environmental review in violation of SEPA. See WAC 197-11-
4 060(5)(d)(ii).

5 The Hearing Examiner should remand the DNS; require the Applicant to supply
6 additional information concerning demolition of an existing boathouse, demolition and
7 replacement of the existing bulkhead, and construction of a single-family residence and
8 driveway; and require DDES to complete environmental review of impacts arising from
9 the full scope of shoreline development associated with the Subdivision.

10 **B. Applicability of the Critical Areas Ordinance**

11 1. Environmental Review Improper under the SAO

12 DDES erred by conducting environmental review under the King County Sensitive
13 Areas Ordinance ("SAO"). Contrary to DDES's conclusion in Note D.b. [sic] of the
14 DNS, the proposed shoreline development is not vested to the SAO and should have been
15 mitigated for consistency with the current standards of Chapter 21A.24 of the King
16 County Code ("KCC") and the Critical Areas Ordinance ("CAO").

17 As discussed in Section A above, the proposed shoreline development is related to
18 final approval of the Subdivision. While the Subdivision vested to the King County Code
19 in effect on July 21, 2003, for which DDES issued a determination of non-significance on
20 June 16, 2005, the 2005 DNS did not cover the proposed development in the shoreline
21 jurisdiction. The Applicant's predecessor expressly requested that DDES delay review of
22 any development within the shoreline jurisdiction.²

23
24 ² In a letter dated December 12, 2003, the original applicants of the Subdivision noted a shoreline
25 substantial development permit was necessary for the Subdivision but would be delayed to a later date. On
February 1, 2005, the applicants requested deferral of the Shoreline Permit until the extent of construction

GordonDerr.

STATEMENT OF APPEAL - 4

2025 First Avenue, Suite 500
Seattle, WA 98121-3140
(206) 382-9540

1 Because the Applicant's predecessor purposefully delayed environmental review
2 and permitting of the shoreline development, the Applicant's right to develop in the
3 shoreline under the SAO did not vest with the Subdivision application. Obligations and
4 rights to develop in the shoreline vest on the date of a complete application for a
5 substantial development permit. *See Talbot v. Gray*, 11 Wn.App. 807 (1974).
6 Accordingly, the Shoreline Permit should have been treated as a new permit application
7 for purposes of development in the shoreline jurisdiction. Environmental review should
8 have been based upon application of King County's CAO in effect on September 29,
9 2010.

10 The Hearing Examiner should remand the DNS to DDES for environmental
11 review and mitigation of the proposed shoreline development in light of the applicable
12 CAO.

13 2. Proper Notice and Opportunity to Comment

14 Should the Hearing Examiner disagree about the applicability of the current CAO,
15 due process requires the Hearing Examiner to remand the DNS and direct DDES to re-
16 issue public notice concerning environmental review of the proposed shoreline
17 development under the SAO.

18 The original Notice of Application for the Shoreline Permit, dated October 18,
19 2010, stated that Title 25 and Chapter 21A.24 KCC would be used for environmental
20 review and mitigation of the proposed shoreline development. The date of complete
21 application was listed as September 29, 2010. No other information in the Notice of
22 Application indicates that environmental review would be conducted for consistency with
23

24 within the shoreline jurisdiction was known. The February 1, 2005 letter was expressly referenced as part of
25 the record when DDES issued the 2005 DNS for the Subdivision. The Moes obtained each of these letters
upon review of DDES file number L03S0019.

STATEMENT OF APPEAL - 5

GordonDerr.

2025 First Avenue, Suite 500
Seattle, WA 98121-3140
(206) 382-9540

1 the SAO.³ On November 18, 2010, in accordance with the Notice of Application, the
2 Moes submitted a comment letter recommending appropriate mitigation consistent with
3 the current CAO.

4 On April 4, 2011, long after the public comment period closed, DDES staff issued
5 a memorandum concluding that environmental review of the proposed shoreline
6 development would be conducted under the SAO, as opposed to the current CAO under
7 Chapter 21A.24 KCC. See attachment B to Att. D. The Moes did not learn of this change
8 until April 25, 2011, one day prior to issuance of the DNS, and the public has never been
9 given such notice and the opportunity to comment with knowledge that development
10 would be conducted under the SAO. As such, the public, including the Moes, did not
11 receive proper notice and were denied an opportunity to appropriately comment on the
12 DNS.

13 Once DDES changed the regulatory framework under which the proposed
14 shoreline development would be reviewed, due process required DDES to re-issue the
15 Notice of Application with the applicable development regulations or, at a minimum, to
16 timely notify all parties of record, including the Moes, who had already submitted
17 comments based on consistency with the current CAO, not the SAO.

18 The Hearing Examiner should remand the DNS and require DDES to evaluate the
19 environmental impacts of the proposed development and mitigation of those impacts
20 based upon the CAO, or to re-issue the Notice of Application and allow the public time to
21 properly comment on the proposal pursuant to the SAO.

22
23
24 ³ Hillary Schafer, who was the designated SEPA Contact at DDES through November 2010, also informed
25 Ray Liaw, attorney for the Moes, that the Shoreline Permit would be reviewed under current Shoreline
Regulations and the CAO.

1 C. Inadequate SEPA Conditions Regarding Steep Slopes on the Site

2 DDES erred by failing to impose SEPA conditions on the proposed shoreline
3 development to require buffers for steep slope hazard areas. It is unclear why DDES did
4 not enforce a steep slope hazard area buffer, which is required under both the CAO and
5 the SAO. DDES simply concludes in Note D.a. [sic] of the DNS that the steep slope
6 within the northerly half of subject site has been graded and altered in the past and does
7 not now exist as a natural land form.

8 The Applicant has proposed shoreline development, including construction of a
9 single-family residence and driveway access, near to and within steep slope areas
10 exceeding 40 percent grade and 20 feet in height. The steep slope areas on the subject site
11 meet the definition of "steep slope hazard areas" under either the CAO or the SAO. See
12 KCC 21A.06.1230. The only exemption from development restrictions in steep slope
13 hazard areas exceeding 20 feet in height permit the "approved regrading" of any slope that
14 was created through previous legal grading activities. KCC 21.24.310.D.2. There is no
15 exemption from the buffer requirement for steep slopes that have been graded or altered in
16 the past or do not exist as a natural land form. Development restrictions in steep slope
17 hazard areas still apply on all slopes that remain at forty percent or steeper. See KCC
18 21A.24.310.D.2. It is unclear how past grading or altering of the steep slopes on the
19 subject site would lead to the conclusion that they are exempt from the buffer
20 requirements of either the CAO or the SAO.

21 Moreover, the Applicant has not provided adequate evidence to conclude that the
22 steep slopes were created through previously legal grading activities. DDES has received
23 numerous geotechnical reports regarding the subject site from the Applicant, the
24
25

STATEMENT OF APPEAL - 7

GordonDerr

2025 First Avenue, Suite 500
Seattle, WA 98121-3140
(206) 382-9540

1 Applicant's predecessor, and the Moes, which collectively do not provide clear indication
2 about whether the steep slope areas are "man made."

3 The Hearing Examiner should remand the DNS with direction to impose SEPA
4 conditions on the proposed shoreline development to require buffers for steep slope
5 hazard areas.

6 **D. Failure to Address Probable Significant Adverse Impacts**

7 The Applicant failed to disclose environmental impacts in the environmental
8 checklist for the proposed shoreline development, and, correspondingly, DDES failed to
9 consider these impacts as parts of its SEPA review. The proposed shoreline development
10 has the following adverse environmental impacts that have neither been considered nor
11 mitigated:

12 **1. Bulkhead Removal**

13 The DNS fails to address any environmental impacts associated with the proposed
14 removal of the bulkhead located at the Ordinary High Water Line, including, but not
15 limited to, in-water and surface effects to Lake Washington. While DDES determined
16 that continuation of the bulkhead is not permitted under the Shoreline Master Program,
17 there is no indication that DDES completed environmental review of bulkhead removal.
18 See Att. D, Finding ¶9, Condition ¶17.

19 **2. Demolition of the Boat House**

20 The DNS fails to address any environmental impacts associated with the proposed
21 demolition of an existing boat house along Lake Washington, including, but not limited
22 to, in-water and surface effects to Lake Washington. Because the Applicant failed to
23 provide any plans concerning demolition of the boat house, which was previously illegally
24
25

1 used as a residence, or potential fill and regrading of the area following demolition, there
2 is no indication that DDES conducted environmental review of the boat house demolition.

3 3. Replacement of the Bulkhead

4 The DNS fails to address any environmental impacts associated with future
5 installation of a "retaining wall" above the Ordinary High Water Line, as DDES
6 authorized to replace the existing bulkhead, *sua sponte*, in Finding ¶9 of the Shoreline
7 Permit Report and Decision. Potential impacts include, but are not limited to, in-water
8 and surface effects to Lake Washington and impacts to wildlife habitat, including eagles,
9 geese, and beaver nest areas, that have been observed in the area of the proposed retaining
10 wall.

11 4. Single-Family Residence

12 DDES improperly allows, or otherwise fails to adequately condition, development
13 of a single-family residence in the subject shoreline lot. The development is proposed in
14 areas subject to aquatic area, steep-slope hazard area, and wildlife habitat area buffer
15 restrictions. Potential impacts include, but are not limited to, potential erosion and
16 landslide hazards, harm to wildlife, including eagle, geese, and beaver nesting area,
17 increased pollution-generating impervious surface-areas, grading and filling, and
18 construction and design-related harm to surrounding properties.

19 5. Driveway Access

20 DDES improperly concludes that development of the proposed driveway access to
21 the subject shoreline lot, which includes grading, filing, and slope stabilization, is
22 permissible. The DNS fails to adequately address alternative access to the subject site,
23 nor how a driveway installed in steep slope and landslide hazard areas, leading to an
24 aquatic area buffer, is unavoidable. Potential impacts include, but are not limited to,
25

STATEMENT OF APPEAL - 9

GordonDerr.

2025 First Avenue, Suite 500
Seattle, WA 98121-3140
(206) 382-9540

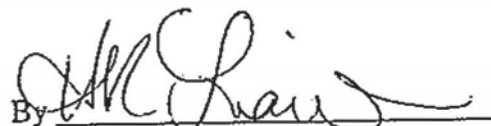
1 decrease slope stability, erosion, and damage to neighboring properties along contiguous
2 steep slope hazard areas.

3 **II. STATEMENT OF HARM AND RELIEF SOUGHT**

4 The Moes own a residence at 10910 81st PI NE, Kirkland, which is the waterfront
5 lot located immediately west of the subject site of the Shoreline Permit. The Moes are
6 concerned about impacts from the proposed shoreline development on both their own
7 property and the subject site, including potential erosion and landslide hazards, aquatic
8 and wildlife habitat along their shared shoreline, unknown scale and implementation of
9 construction activities, and unknown scale and design of the single-family residence. The
10 DNS does not adequately address the Moes' concerns about construction impacts from
11 demolition, grading, and building to neighboring properties, especially in light of heavy
12 construction equipment and materials that may be hauled down the existing steep slopes.
13 The DNS omits any consideration of adverse impacts from future design of the single-
14 family residence. The Moes have also been denied proper notice and opportunity to
15 comment on the proposed shoreline development. The Moes respectfully request that the
16 DNS be remanded so that the errors alleged herein can be addressed in an adequate
17 environmental review determination that meets the requirements of SEPA.

18 DATED this 19th day of May, 2011.

19
20 GORDONDERR LLP

21 
22 By Brent Carson
23 Brent Carson, WSBA # 16240
24 H. Ray Liaw, WSBA # 40725
25 Attorneys for Peter and Barbara Moe

GordonDerr.

2025 First Avenue, Suite 500
Seattle, WA 98121-3140
(206) 382-9540

STATEMENT OF APPEAL - 10

Attachment A

December 1, 2010

Mark Mitchell, PPMIII
Department of Development and Environmental Services ("DDES")
Building and Fire Services Division
900 Oakesdale Avenue Southwest
Renton, Washington 98057-5212
Mark.Mitchell@kingcounty.gov

Re: Shoreline Substantial Development Permit Application No. L10SH004

Dear Mr. Mitchell:

This letter supplements our comment letter of November 18th, 2010, on behalf of Peter and Barbara Moe concerning the above-referenced shoreline substantial development permit application ("SSDP Application"). Specifically, we are providing supplemental information that we just received concerning the steep slope area on the subject site for the SSDP Application.

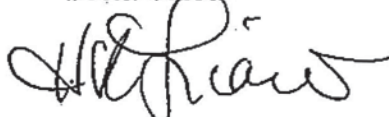
On November 30, 2010, we received copies of geotechnical reports that were conducted on the subject site by Cornerstone Geotechnical, Inc., dated February 19, 2003 and April 25, 2003. These reports are attached as Exhibits A and B to this letter. Cornerstone determined that the steep slope area constitutes the original shoreline bluff prior to the lowering of Lake Washington approximately 9 feet in 1916. See Exhibit A where flagged. Accordingly, Cornerstone concludes the steep slopes on the site exceeding 20 feet in height are naturally occurring and are not exempt based on King County Code section 21A.24.310.D.2.

The proposed shoreline development is not in compliance with the King County Critical Areas Ordinance. The steep slope area located in the shoreline jurisdiction of the site are naturally occurring as a result of the lowering of Lake Washington, and the SSDP Application must comply with development restrictions for steep slope hazard areas.

Very truly yours,



Brent Carson



Ray Liaw

Attachments

Attachment B.

April 27, 2011

Mr. Mark Mitchell
King County
Department of Development and Environmental Services ("DDES")
900 Oakesdale Avenue SW
Renton, WA 98057-5212

Re: Critical Areas Review of L10SH004

Dear Mark:

On April 25, 2011, I reviewed records pertaining to shoreline substantial development permit application file number L10SH004 (the "SSDP Application") on behalf of Peter and Barbara Moe. I am writing concerning an April 4, 2011 memorandum to you from Laura Casey, Environmental Scientist III, regarding critical area review of the SSDP Application. In this memorandum, Ms. Casey concludes that the "entire project is vested to the King County Sensitive Areas Code." If DDES intends to review the SSDP Application under a prior version of the King County Code, including the Sensitive Areas Ordinance, DDES must re-issue the Notice of Application and provide adequate time for comment.

The Notice of Application for the SSDP Application, dated October 18, 2010, states that the SSDP Application will be reviewed under Title 25 ("Shoreline Regulations") and Chapter 21A.24 ("CAO") of the King County Code. The date of complete application for the SSDP Application is listed as September 29, 2010. There is no other information in the Notice of Application indicating that the SSDP Application would be reviewed under prior Shoreline Regulations and the CAO. In fact, I called Hillary Schafer in October 2010, when she was the lead staff on this SSDP Application, to request clarification as to which version of the King County Code would be used to process the SSDP Application. Ms. Schafer informed me that the SSDP Application would be reviewed under the current Shoreline Regulations and CAO.

In accordance with DDES's Notice of Application and confirmation from Ms. Schafer, we reviewed the SSDP Application and submitted a comment letter concerning the SSDP Application's consistency with the current version of the Shoreline Regulations and the CAO. Should DDES change the regulatory framework under which the SSDP Application will be reviewed, my clients should be afforded adequate time to revise their comments.

Moreover, it is not clear that the SSDP Application is vested to the Sensitive Areas Ordinance. The SSDP Application is purportedly related to construction of preliminary short subdivision L03S0019 (the "Preliminary Short Plat"), approved on June 16, 2005. The Preliminary Short Plat is vested to the King County Code in effect on July 21, 2003. However,

the original applicants of the Preliminary Short Plat never applied for a shoreline substantial development permit. The original applicant expressly chose to delay review of any development within the shoreline jurisdiction.

In a letter dated December 12, 2003, the original applicants of the Preliminary Short Plat noted that a shoreline substantial development permit would be necessary for construction of Lot 1, but that the SSDP Application would be delayed to a later date. See letter from Ivana Halvorsen at Barghausen, attached hereto as Exhibit A. On February 1, 2005, the original applicants again requested deferral of the SSDP Application until the extent of construction within the shoreline jurisdiction was known. See letter from Ivana Halvorsen at Barghausen, attached hereto as Exhibit B. The February 1, 2005 letter was expressly referenced as part of the record when DDES issued a Determination of Non-Significance for the Preliminary Short Plat.

Because the original applicant purposefully delayed the SSDP Application, the applicant's rights to develop in the shoreline did not vest with the Preliminary Plat Application. Obligations and rights to develop in the shoreline vest on the date of a complete application for a substantial development permit. See *Talbot v. Gray*, 11 Wn.App. 807 (1974). Pursuant to the original applicant's request for deferral during approval of the Preliminary Short Plat, the SSDP Application should be treated as a new permit application for purposes of development in the shoreline jurisdiction and should be reviewed under King County's Shoreline Regulations in effect on September 29, 2010.

King County's Shoreline Regulations state that if development is proposed on shorelines, including one or more sensitive areas, as defined in KCC 21A.06, such development shall be done in accordance with regulations and procedures set forth in KCC 21A.24. See KCC 25.16.100.C.2. Accordingly, the SSDP Application triggers the current CAO for the proposed shoreline development, not the County's prior Sensitive Areas Ordinance to which the Preliminary Short Plat is separately vested. The CAO regulates development in aquatic areas and should be applied to all development activities contemplated by the SSDP Application.

If DDES disagrees about the applicability of current Shoreline Regulations and the CAO to the SSDP Application, we respectfully request that DDES re-issue the Notice of Application with a correction as to which version of the King County Code applies, and allow time for my client to properly comment on the SSDP Application.

Very truly yours,

GORDON DERR LLP



H. Ray Liaw

Attachments